

February 17. 1756.

MEMORIAL

F O R

Campbell (Colin) of Killinallen

Colin, Duncan, and Margaret Campbells, Children and Executors of the deceased Katharine Campbell, Pursuers;

A G A I N S T

John Campbell of Ardnave, Defender.

THE Pursuers are now insisting, in Right of Succession to their Mother, against the said *John Campbell of Ardnave*, their Stepfather, to account for her Share of the Goods in communion at the Time of her Death. In Course of the Process, the Defender has given in an Account of the Goods in communion in the Form of Charge and Discharge; to which Account the Pursuers gave in sundry Objections, particularly to a Set of Bills granted by the Defender, upon the 16th of *August 1744*, in lieu of certain Debts and Legacies owing and bequeathed by *Alexander Campbell of Killinallen*, the Pursuers elder Brother, to whom the Defender was Executor nominate, amounting to no less a Sum than *L. 550 Sterling*, beside Annualrents. The Lord *Minto* Ordinary having thought proper, by his Interlocutor of Date the 26th of *January 1754*, to repel the Objections to the said Bills; the Pursuers, first, by a Representation to his Lordship, craved a Review of the said Interlocutor, and afterwards by a Petition to the whole Lords; which having been ordained to be answered, and the Facts not being so fully stated in the Petition, the Pursuers have presumed to trouble the Lords with a short Memorial, in order to clear up that extraordinary Scene of Management entered into by the Defender, for no other Purpose but to deprive the Pursuers of that Part of the Goods in communion which they are intitled to as nearest of Kin, and Executors to their Mother, both by Nature, and, as they are advised, by the Law of this Country.

The Facts upon which the Determination of this Point depends, are shortly these: The Pursuers Father, *John Campbell of Killinallen*, having died in very opulent Circumstances, his Widow *Katharine Campbell*, soon after his Death, intermarried with the Defender; who at that Time was not possessed of any Effects of his own; but by their improving the Effects brought with the Wife, which amounted to the Sum of *L. 500 Sterling* in Moveables, a separate Liferent-annuity, and further the Liferent of a lucrative Tack, they, at the Time of the said *Katharine Campbell's* Death, were possessed of Funds to the Extent of *L. 1500 Sterling*, or more.

During the Subsistence of the Marriage, there was a Child or two born; but these having died, and there being no Appearance of any after Children, the Defender bethought himself of a Scheme, whereby he might monopolize to himself the whole Funds and Effects he had got by his Wife, and the Conquest during the Marriage, in order to disappoint the Pursuers, her Children by a former Marriage, of the Claim which they naturally had to the Half of the Goods in communion at the Time of their Mother's Death: But, what is more extraordinary, he thereby meant to disappoint his Wife of the Right competent to her in these Goods, had she survived him; seeing that, by Contract of Marriage produced, the Wife, in case of no Childrens existing of the Marriage, is provided to the Half of the free Moveables at the Husband's Death, in case she survived him.

The Method which he took to execute this Scheme he had fallen upon, was suggested by an Event now to be mentioned. In the Year 1741, the Pursuer's elder Brother, *Alexander Campbell of Killinallen*, died, and named the Defender his sole Executor and universal Legatar, with the Burden of the Payment of a Variety of Legacies, and a few Debts. Upon this Title he intromitted with, and uplifted *Killinallen's* Funds and Stocking, amounting, as appears from the confirmed Testament, to *L. 1212: 11: 4 Sterling*. From which Testament in Process it appears, that, after paying all the Debts and Legacies

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owing and left by *Killinallen*, the Defender had to himself upwards of *L. 100 Sterling*; a very sufficient Recompence for any Trouble that he might have had in the executing of this Trust. Notwithstanding of which he has endeavoured, by a most fraudulent Contrivance, to make *Killinallen's* Debts and Legacies affect the Goods in communion; whilst he might pocket *Killinallen's* Effects, whereof he had left more than sufficient for paying all these Debts and Legacies.

And the Method which he took was this. As to the Debts which were owing to *Killinallen*, these he converted into Bonds to himself, secluding Executors; by which they were rendered heritable, and by this Means could not fall under the *communio bonorum* betwixt Husband and Wife. And further, as to the Creditors of *Killinallen*, he, in order to make their Debts affect the Goods in Communion, granted to them his own Bills to the Extent of upwards of *L. 500 Sterling*. These he now takes Credit for in the Account of Charge and Discharge produced by him in this Process, for accounting for the Goods in Communion. This being the Case, the Pursuers insisted, That these Bills granted by the Defender for the Debts owing and Legacies left by *Killinallen*, can never be mustered up to exhaust the Goods in Communion; but, in a Question betwixt the Wife or her nearest of Kin, and the Husband, must be considered as a fraudulent Contrivance to deprive them of the Right, which by the Law of the Country they have in these Goods.

To judge of this Question, it will be proper to have in View the Interest which would have been competent to the Wife, supposing her to have survived the Defender; as by this will be made appear the Fraud by which he now endeavours to disappoint the Pursuers in her Right. And,

In the *first* place, It has been already noticed, that the Defender, at the Time of his Marriage with the Pursuers Mother, was possessed neither of Heritage or Moveables; so that she would not have been intitled to any Terce of Lands, or any Part of Moveables, in virtue of her *jus relicte*. It was for this Reason, that, by her Contract of Marriage, she was provided to the Half of the free Moveables; all which she had brought with her at her Marriage, in Case she had survived her Husband the Defender. And it will occur to your Lordships, that by this Contrivance of the Defender's, his having in the Manner above set forth granted these Bills to *Killinallen's* Creditors and Legatees, and innovating the old Securities left by *Killinallen* for Payment of these Debts and Legacies, was in order, as hath been said, to disappoint the Pursuers of their just Right.

The only Answer that hath been made for the Defender, is, That a Husband is not accountable for the Manner of his Administration during the Marriage; and that the Pursuers Interest can go no further than their Mother's Share of the free Effects that were in Communion at the Time of their Mother's Death.

In answer to which the Pursuers will admit, that the Husband, during the Marriage, is *dominus actu*, with very large and extensive Powers over the Goods in communion. He may change the Moveables into Heritage, and may alienate where there is a rational, though not strictly onerous Cause. But they, with Submission, contend, that the Wife has an Interest and Right in these Goods, which the Husband cannot altogether evacuate; and if it appear that the Husband has *dolose*, by any Deed of his, attempted to disappoint her Interest, that in such a Case the Law will give Redress. To this Purpose the learned Author of the late Institute, when talking of the Interests of Husband and Wife, upon the Dissolution of the Marriage by Death, says, in so many Words, *vol. 1. p. 136. § 113.* "That such Deeds as appear to have been granted in defraud of her the Wife's Right, will be void upon the Head of Deceit." And as it clearly appears from the Facts, as above set forth, that this Transaction of the Defender's with *Killinallen's* Creditors, was nothing else but a fraudulent Contrivance to deprive the Wife, as well as her Children, of their Right competent to them in the Goods in communion; and seeing that it appears, from the confirmed Testament produced, that the Debtors therein to *Killinallen*, are the same Persons with those in the Bonds granted to the Defender, secluding Executors; and as it likewise clearly appears, that the Debts and Legacies left by him are rested and legated to the same Persons to whom the Defender grants the Bills now objected to, that therefore this whole Scene of the Defender's Management must appear to have been fraudulent and deceitful, and intended for no other Purpose, but to deprive the Pursuers of their Right to their Mother's Part of the Goods in communion.